IN THE HIGH COURT OF JUDICATURE OF BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO. 9 OF 2004

IN

INSOLVENCY NOTICE NO.N/357 OF 2004

Mr.Shankar Moitra . .. Judgement Debtor/applicant

M/s.V.R.Maheshwari & Co. .. Judgement Creditor

...

Mr.Shailesh Naidu i/b B.V. Phadnis for Judgement debtor.

Mrs.M.A. Shah for judgement creditor.

CORAM : D.G. KARNIK,J.

DATED : 19th July 2005.

P.C.:

1. This motion is taken out by judgement debtor for setting aside the insolvency notice dated 13th December 2004 served upon the judgement debtor on 18th December 2004.

2. The judgement creditor filed a summary suit bearing 451 of 2001 joining Mr.K.G.K. Rao as defendant no.1, the present applicant as defendant no.2 and Mahauni Drums Pvt.Ltd. as defendant no.3. Summons for Judgement was taken out and was served on the applicant on 3rd July 2001. The applicant did not file any reply and therefore, the Court passed a decree against the applicant under Order 37 Rule 3 of the Code of Civil Procedure on 5th February 2003. The amount due under the decree was not paid and therefore, an insolvency notice has been served on the present applicant. This motion is taken out by the applicant for setting aside that notice.

3. Learned counsel for the applicant states that the decree passed in suit no.451 of 2001 is void and not binding on the present applicant. He submits that the suit was not based on a written contract and therefore could not have been filed as a summary suit. He further submits that the alleged debt was in respect of a transaction entered into by the defendant no.3 which was a private company and therefore, the present applicant who was only a director could not be personally sued. Finally, he submits that in any event, the payment was made by

defendant no.3 through a different concern and therefore, no money was due. All these defences are the defences about the merits of the suit and could ought tohave been raised by filing of an application for leave to defend or an affidavit in reply to the summons for judgement. The defences do not relate to the jurisdiction of the Court. Even an erroneous decree is binding on an executing court as well as on an insolvency court. In the circumstances, these defences cannot be a ground for setting aside the insolvency notice.

4. It was lastly submitted that the applicant has already taken out a motion bearing no.1113 of 2005 for setting aside the decree under Order 37 Rule 4 of the Code of Civil Procedure. The very existence of a decree is in the challenge and is likely to be set aside. As and when decree is set aside, the applicant may have a separate cause of action. Today, the decree stands and the applicant has not made the payment in respect of insolvency notice. Hence, insolvency notice cannot be set aside presently.

5. Motion is rejected.

D.G. KARNIK, J